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IN THE FAMILY COURT OF NOVA SCOTIA

Cite as: Nova Scotia (Community Services) v. A.R., 2008 NSFC 23

BETWEEN: MINISTER OF COMMUNITY SERVICES
-APPLICANT

AND

A. R.-R. & R. R.
-RESPONDENTS

AND

ATTORNEY-GENERAL OF NOVA SCOTIA
-INTERVENOR

AND BETWEEN: A. R.- R. & R. R.
-APPLICANTS

AND

MINISTER OF COMMUNITY SERVICES
-RESPONDENT

BEFORE THE HONOURABLE JUDGE BOB LEVY

HEARD AT: ANNAPOLIS ROYAL

DATES HEARD: JUNE 5 AND 11, 2008

COUNSEL: W. BRUCE GILLIS, Q.C. FOR THE MINISTER OF COMMUNITY SERVICES
CATHERINE LUNN FOR THE ATTORNEY-GENERAL
ILANA LUTHER FOR A. R.-R. & R. R.

DATE OF WRITTEN DECISION: JUNE 26, 2008

DECISION

By the Court:

1. This decision concerns an application by the Minister of Community Services for the termination of an access right of the Respondents to a child in permanent care, which child has been placed for adoption. The Minister contends that the would-be adoptive parents will not proceed with the proposed adoption if there is an access order or if their identity is revealed.

2. The application was met with a contention by the Respondents that section 48(5) of the Children and Family Services Act, the section providing for a variation or termination of an access right, is contrary to the Charter of Rights, specifically, section 7, a breach not saved by section 1 of the Charter. As part of that assertion, or standing on its own, the Respondents contend that unless they are allowed to examine or cross-examine the proposed adoptive parents on the Minister's application that this would constitute a denial of fundamental justice. They also argue that unless the would-be adoptive parents are examined the court will be unable to fully and properly assess what is in the best interests of the child. In the alternative they argue that since the actual adoption is to be dealt with in the Supreme Court, and since it is possible that the adoption will not be granted, that this court should not consider the subject of the adoption and should instead just look at the Respondents' access on its own in light of the best interests of the child.

3. By oral decision on June 5 I dismissed the Charter challenge. I also did not oblige the Minister to produce the proposed adoptive parents or either of them, for cross-examination. I also held that I could and would take into account the fact of

the proposed adoption. By oral decision dated June 11, and following a hearing, I granted the Minister's application and terminated the access rights of the parents. I reserved the right to file written decisions.

4. The Respondents have also filed an application for leave to apply for an order holding the Minister of Community Services in contempt for withholding access from the Respondents to their daughter in contravention of the July, 2006 order. This application for leave is *ex parte* and on June 11 I indicated that leave would be granted. That aspect of the matter will be dealt with at the end of the decision.

BRIEF HISTORY AND BACKGROUND

5. By decision in July, 2006 (2006 NSFC 28) and order issued August 24, 2006, the child J., d.o.b. December 20, 2005, was placed in the permanent care and custody of Family and Children's Services of Annapolis County (now Minister of Community Services) subject to access to the child by her parents A. R.-R. and R. R.. That order was not appealed.

6. In the spring of 2007 the agency, (it was then still Family and Children's Services of Annapolis County), had secured an willing adoptive home and the parents were so advised by letter, being further told that once the adoption was granted there would be no further access. The adoption hearing was scheduled for August, 2007, days before which the parents were told that that day would be their last visit with their child.

7. When the matter appeared in Supreme Court for the adoption by happenstance then counsel for the parents was in court and he intervened advising the court that there was an access order in effect, that his clients were statutorily entitled to notice of the proposed adoption and that in his view they had a right to be parties to the adoption application. It appears that the matter was adjourned a number of times by different justices before being heard by Justice Boudreau in November. Justice Boudreau filed a written decision dated January 31, 2008, (2008 NSSC 20), holding that the parents did indeed have a right to be heard and that this would either be in the Supreme Court where the matter could be addressed per section 78(6) of the Act or in the Family Court per section 48(5).

8. The Minister, understanding that the potential adoptive parents would not proceed if their identity was revealed, which of necessity would have happened if the matter continued in the Supreme Court, elected to bring it before the Family Court. The Minister applied before the Honourable Chief Judge John Comeau who concluded that since I had dealt with this case all along that it should be heard before me. I was advised of the above by counsel for the Minister in April, and resolved that given the inordinate delays to date that the matter would proceed as quickly as humanly possible. After several pre-trials to sort out the issues, including assuring due notice to the Attorney-General of the Constitutional challenge, the dates of June 5 and June 11 were set, the 5th for the hearing of the Charter challenge, and the 11th for the hearing on the merits should the Charter challenge not succeed.

9. Briefs on the Constitutional question were solicited of and received from all

counsel. I particularly want to acknowledge the superb, comprehensive brief submitted by Ms. Lunn for the Attorney-General, prepared on short order and under the not-inconsiderable handicap of not knowing the exact argument that was being made by the Respondents, or even, for certain, which section or sections of the Charter were in issue.

10. The child is very young: aged two and a half at present. She has been in care since birth. She is a Downs Syndrome child whose health and circumstances present enormous challenges requiring constant attention, numerous medical interventions and above average parenting.

11. The natural parents are both intellectually challenged and are limited in their ability to comprehend the child's needs and to acquire the requisite, even some very basic, parenting skills. They visited faithfully with the child per my order until their access was stopped in August, 2007. They oppose the Minister's application.

12. The evidence is that the would-be adoptive parents still take the position that they will not proceed with the adoption if their identity is revealed or if there is an outstanding order for access. That is all very well, but the documents (affidavits of social workers, correspondence and pleadings) filed and tendered by the Minister reveal the proposed adoptive parents to be the people who have fostered the child since birth. And the foster mother testified at the disposition hearing two years ago. A submission by counsel for the Respondents reveals that she knows that to be the case. Whether the Respondents themselves comprehend this and would be able to find the would-be adoptive parents is unknown. I am not aware of any effort by

counsel for the Respondents to subpoena them.

CHARTER ARGUMENT

13. The Respondents' Charter argument centers on the 1999 decision of the Supreme Court of Canada in **New Brunswick (Minister of Health and Community Services) v. G. (J.)**, 50 R.F.L. (4th) 63. Counsel argued that as the Court held that the Minister's application for 'extended custody' in a child welfare proceeding implicated the "security of the person" provision of section 7 of the Charter, that an application to deprive a parent of an access right likewise implicates section 7 of the Charter. She further argued that any proceeding which would deny to a party the opportunity to fully cross-examine the would-be adoptive parents would run afoul of the requirement in section 7 of the Charter that one's security of the person can only be denied "in accordance with the principles of fundamental justice".

14. The response of counsel for the Minister of Community Services was that access is not a right of the parents, but rather, as has been held over and over again by the courts, it is the right of the child. Therefore, he argues, there is no parental 'right' and the Respondents cannot invoke the Charter to uphold a 'right' which does not belong to them in the first place.

15. Counsel for the Attorney General argued that access and custody are fundamentally different in nature and that it is the incidents of custody (which was the matter before the court in **G. (J.)**) which bring the security of the person into

play, none of which incidents are components of an access 'right'. She argued that the court should follow the Ontario Court of Appeal in **Catholic Children's Aid Society of Metropolitan Toronto v. T.S. et al** (1989), 20 R.F.L. (3d) 69, which held, paragraphs 43 and 44, that the denial of court-ordered access does not amount to the deprivation of life, liberty or security of the person.

16. Counsel for the Attorney General also cited the Nova Scotia County Court case of **M.K.S. and J.D. v. Minister of Community Services, Respondent and The Attorney General of Nova Scotia, Intervenor** (1988), 86 N.S.R. (2d) 209. The decision was upheld on appeal to the N.S. Supreme Court, Appeal Division, (1989), 88 N.S.R. (2d) 418, and leave to appeal to the Supreme Court of Canada was denied, (1989), 92 N.S.R. (2d) 360.

17. In the County Court Chief Judge Palmeter dealt with a section 15 (equality) argument finding no discrimination present in the Act, (para. 42), and went on to say, (para. 44), that even if the Act may be discriminatory, that he would nonetheless hold that the purpose and the effects of the legislation would be "totally justified" within the provision of section 1 of the Charter. His Honour also dealt with section 7 of the Charter saying, (para. 59):

> "Even if the procedures were found to interfere in any way with the appellant's rights under s. 7 of the **Charter** then I would find that such interference is a reasonable limitation of such rights which might be justified under s. 1 of the **Charter**."

18. His Honour also made the important point that these cases involved not just the rights of the parents, but those of the child, and indeed that the rights of the

child had to be paramount, per s. 79 of the Child Welfare Act, which was the Act in question, the predecessor to the current legislation. As important as are the rights, Charter or otherwise, of the parents, one must recognize that there is another person whose rights are very much at stake and that sometimes the respective claims may be in conflict.

19. I doubt that court-ordered access, under this legislation or any other, is of the nature and status to attract protection under section 7 of the Charter. If it is, and if section 48 (5) & (7) in wording or in operation should perforce breach section 7 rights, or any other under the Charter, then I would hold that it or they are saved by section 1 of the Charter. The objects and purposes of the legislation as set forth in the preamble and in section 2 (1) of the Act represent reasonable limitations prescribed by law and are demonstrably justified in a free and democratic society.

THE PRINCIPLES OF FUNDAMENTAL JUSTICE

20. finding that the Charter does not afford a remedy to the Respondents does not absolve the court from adhering to the principles of fundamental justice. The questions then become: what constitutes fundamental justice in a case such as this? and how is the court to respond when it appears that those principles may collide with the rights and needs of the child?

21. Normally, fundamental justice would be said to include a person being able to make ‘full answer and defence’, within defined limits to put any relevant and admissible evidence before the court and to cross-examine effectively the evidence

that is presented by the other side. In the context of the application to terminate the Respondents' access because of a planned adoption, where the test, per section 48 (7), is "the best interests of the child", it might seem axiomatic that the court would have full evidence before it of the respective options including the ability to make an appraisal of the prospective adoptive parents and that anything less would be tying the hands of the Respondents, and for that matter the court.

22. The Respondents complain that the court is being asked to accept that what the social workers say is the position of the would-be adoptive parents is in fact their position, and further that the court will not be able to determine why they are of that opinion without them being called to answer that question. Counsel for the Respondents called this, in essence, hearsay.

23. Judge Palmeter quoted with approval the following from **T.T. v. Catholic Children's Aid Society of Metropolitan Toronto** (1984), 39 R.F.L. (2d) 279 at page 295:

> "However, a number of decisions have recognized that the concept of fundamental justice is a relative term and that the nature of the proceedings and the issue to be decided are important factors to consider when determining what are essential procedural protections."

24. The nature of this proceeding and of this type of proceeding is such that it potentially pits the rights of a party against the rights and needs of the child. According full fundamental justice rights to parents may well scare off potential adoptive parents. It would be poor public policy and an extreme disservice to children to erect barriers to their successful placement in a secure and loving home

by obliging prospective adoptive parents to compromise their privacy and face the prospect of being put through the wringer of contested court proceedings.

25. It is not the role of this court on this application to weigh the merits of the would-be adoptive parents to adopt this child or to pass judgement on their decision that they do not want access or even to be identified. Rather, it is my role to see to it that the child's best interests are served, (s. 48(7)), or at a minimum not compromised, within the context of a legislative presumption in favour of adoption over access per section 47(2), the principles of which, logically, should be read into s. 48 (7).

26. Justice Gonthier in **New Brunswick (Minister of Health and Community Services) v. M. L. and R. L.** (1998) , 41 R.F.L. (4th) 339, addressed the adoption versus access question head on. He wrote, *per curiam*, para. 39: "...an adoption, which is in the best interests of the child, must not be hampered by the existence of a right of access...". He continued, para. 51, "A child's emotional stability is of prime importance". In para. 50:

> "If adoption is more important than access for the welfare of the child and would be jeopardized if a right of access were exercised, access should not be granted...In other words, the courts must not allow parents to "sabotage" an adoption that would be beneficial to the child...".

27. In brief, in the name of fundamental justice to afford the Respondents the opportunity to cross-examine the would-be adoptive parents would be to sacrifice the right of the child to a secure family placement. Whose right or interest is the more compelling - the right of the child to a secure and stable home or the right of the parents to question the prospective adoptive parents? Section 2 (2) of the Act

resolves the issue. It provides that the paramount consideration in all proceedings and matters pursuant to the Act is the best interests of the child. The request that the prospective adoptive parents be produced for cross-examination is denied.

SHOULD THE ACCESS SHOULD BE TERMINATED?

28. No doubt the answer I would give to this question is evident from reading the previous section.

29. If this decision was only about the Respondents they would win hands down. They strike me now, as they did at the original proceeding, as decent, caring, peaceful and loving people. One would go along way and run across a lot of people before meeting anyone more bereft of guile. They have attended faithfully to every access opportunity afforded them by the agency/Minister. Their child is the center of their lives. They care for her, they exult in being with her, they are concerned about her health and development.

30. To the extent that the Minister attempted, however inconsistently and half-heartedly, to draw horns on them, it didn't work. There was considerable evidence at the hearing from the access supervisor, whose affidavit, less so her oral testimony, seemed to be one long explanation of what was in the minds of the Respondents. Everything seemed to be her perception of events and motives rather than her objective observations. That might have been less objectionable, although only marginally so, had she the expertise to give opinion evidence but she didn't, at least none were put before the court.

31. In fact it doesn't appear, even to this day, that the workers understood the Respondents as well as they thought they did. An example: much was made of the Respondents describing their little girl as "perfect". That, they maintained was an indication of how little they grasped the mental and health challenges of their child. Inherent in their position is that the child was anything but perfect, and very obviously so.

32. Challenged on this point, the child's mother gave the most profoundly eloquent and beautiful statement I have ever heard in court or perhaps elsewhere. Yes, she said, "...she is perfect, just like me." That is a parent's truth. That is the truth of a woman who has been looked down on and devalued her entire life and who absolutely will not wear the mantle of incompleteness or defectiveness that others would drape upon her. In a word, the parents were not oblivious to their daughter's challenges, they simply saw beyond them to see to her beauty and promise.

33. The child's mother went on to make the point that she knew her daughter would face that same ridicule and cruel treatment growing up that she herself faced and she wanted to be able to comfort her and to tell her not to let it get to her. That was a genuinely moving comment. As was her answer to the question from her counsel as to what she would want to say to her child. She said, demonstrating her resigned insight as to where this hearing was headed, "Tell her not to forget her mother and her father."

34. Counsel for the Minister was critical of the Respondents because they were

not happy with the Minister for telling them that their access had to stop. They didn't want to hear about it. Indeed they still harbour the hope, the unrealistic hope, that they would some day be able to resume the care of their child. That is far from a character flaw and the fact that they expressed themselves unambiguously on the Minister's designs means nothing to me other than that they weren't happy about them.

35. There is evidence that the parents enjoyed and cherished their access immensely, and their evidence was that the child enjoyed the visits. There is no strong evidence however, not surprisingly given the child's age when access was stopped, that the child developed any kind of an attachment to them. That, and the fact that it has now been almost a year since the parents had access to the child, would indicate that the child will suffer no trauma from being denied access to the Respondents. What the parents as visitors can offer is not necessarily inconsequential but it is not on a par with a permanent and stable placement in a loving home.

36. That the parents continue to hold on to the belief that the child can be and should be returned to their care would inevitably make their access problematic. It is not apparent that they appreciate how limited their comprehension of their own or their daughter's circumstances are, how much would be involved in her care and how tenuous are their resources. They expressed concern about a bruise that appeared on the child. If they were are prone to accusing the would-be adoptive parents of abusing their child, it is a relationship that cannot work and which would not benefit the child.

37. I should also say that I well recall the evidence of the foster mother, the would-be adoptive mother, at the hearing two years ago. She impressed me greatly then with her compassion, her patience and her attention to the multiple challenges that parenting J. meant. It is for another court to decide if the adoption should go through but I draw some considerable comfort from the belief that the child is and would be fortunate to be in such a home.

38. Post care and custody access should be the exception and not the rule, (**Minister of Health and Community Services v. M.L. & R.L.** supra, para.44). It cannot be allowed to impair a child's prospects for adoption and if there is evidence, (and, I assert, not merely theory or conjecture), that access is impairing the child's chances for adoption then it must be terminated. That evidence is before the court. I accept it. An order shall issue terminating the Respondents' right of access.

39. I have directed that as a cost of the proceeding, the Minister shall, by July 15, 2008, give to the Respondents a 10 x 14 framed, professional portrait of J..

APPLICATION FOR LEAVE TO APPLY FOR CONTEMPT

40. The Respondents have made application for leave to apply for an order holding the Minister of Community Services in contempt for the alleged breach of the court order granting the Respondents the right of access. Leave is granted for the reasons set forth below although, of course against the Ministry, the

department, not the Minister personally. The matter is adjourned without day, and any further step in the process is hereby suspended, to enable the parties to engage in some discussion that may lead to a mutually acceptable resolution.

41. Section 90 of the Children and Family Services Act reads:

> **Enforcement of order**
>
> **90** Where a person, who is required by an order of the court pursuant to this Act to do an act or to abstain from doing an act in relation to the custody, care, or care and custody of a child or access to a child, disobeys the order, the court may enforce the order or punish for contempt of court in the same manner and following the same procedure as provided for such a case in the Supreme Court. 1990, c. 5, s. 90.

42. Does such a proceeding have to be brought in accordance with the Proceedings Against the Crown Act? I believe that the scope of that legislation is set forth in sections 4 and 5, and is confined to matters relating to land, contract and tort. This, obviously is outside those parameters. Additionally, it would be unwieldy and inappropriate to mandate that matters relating to access or custody go through that Act. Certainly its requirement of two months notice is inappropriate in a matter involving children. Additionally, with the Ministry now having taken over much of the child welfare work throughout the province one cannot imagine that any time someone wants to bring an application against the Ministry, say for an application to terminate care and custody, that they would have to labour under that cumbersome procedure.

43. Civil Procedure Rule 55 deals with contempt applications and Rule 55.02 deals with leave applications. The parents have made such an application in

conformity with Rule 55.02 (2) alleging that denying access to the parents since August, 2007, despite the ruling of Justice Boudreau that the access order was still in force and despite repeated requests by counsel for the parents that access be re-instated, amounts to contempt.

44. In the course of the hearing on the Minster's application for the access to be terminated the court heard evidence that may have some bearing on the issue. Essentially it is asserted that Ministry counsel and personnel did not correctly understand the law and that if there was any failing on the part of the Minister it stemmed from that. Maybe. But given that the parents did not lead evidence on the contempt application as such, it is only right that they be allowed to do so. Certainly, it is a serious allegation and a serious matter if the Ministry consciously and deliberately disobeyed a court order and the surrounding circumstances need to be fully canvassed. I nonetheless hope that the parties will be able to come to an agreement, an agreement, I trust, that will include an assurance that this most unfortunate occurrence not happen again.

IN CONCLUSION

45. This has not been a happy case. Firstly, the Respondents have lost the custody of and now access to their daughter not because of any fault on their part, but simply because of their mental capacities. Secondly, they have lost almost a whole year of contact with their beloved daughter because an erroneous interpretation of the statute by departmental counsel, (believing, I am told, that an access right granted under this Act cannot be continued by the adoption court). Thirdly, the delay in having the way cleared for the adoption to proceed has been

extraordinary and entirely unnecessary as the statutory provisions to resolve the issue are clear and expeditious.

46. The child deserved better as did the Respondents.

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Bob Levy, J.F.C.